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October 28, 1994

BY HAND

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

Re: MM Docket No. 92-266

Dear Mr. Caton:

This is to provide notice, pursuant to Section 1.1206 of the Commission's Rules, that the undersigned and Robert L. Hoegle, as counsel for Encore Media Corporation ("Encore"), met late in the afternoon of October 31 with Lisa B. Smith of Commissioner Barrett's office and today with Jill M. Lockett of Commissioner Chong's office.

We discussed the treatment of premium services and their multiplex channels, specifically Encore and its Thematic Multiplex Channels, in connection with the Commission's proposal to amend its "going-forward" regulations.

If you have any questions regarding this matter, please contact me.

Very truly yours,

James E. Meyers

James E. Meyers
Counsel for
Encore Media Corporation

Enclosures

cc: Lisa B. Smith (w/encl.)
Jill M. Lockett (w/encl.)

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THE MULTIPLEX EXEMPTION IMPLEMENTED BY THE COMMISSION

The Commission implemented the clearly stated Congressional intent and adopted regulations reflecting the broad and flexible Multiplex Exemption to rate regulation. The Commission stated that:

We will exclude from the definition of cable programming service per-channel or per-program premium services offered on a multiplexed or time-shifted basis. This approach is consistent with congressional intent and is supported by the record. Thus, multiplexed or time-shifted offerings of per-channel or per-program services will not be subject to rate regulation complaints so long as they consist of "commonly-identified video programming" and are not bundled with any regulated tier of services.

First Report and Order, MM Docket No. 92-266, 8 FCC Rcd. 5631 (1993), at ¶326 (notes omitted).

Section 76.901(b) of the Commission's Rules provides that:

Cable programming service. Cable programming service includes any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than:

* * *

(3) A combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service:

- (i) Consists of commonly-identified video programming; and
- (ii) Is not bundled with any regulated tier of service.

ENCORE'S THEMATIC MULTIPLEX AND THE MULTIPLEX EXEMPTION

I. Background

A. Development of Thematic Multiplex Plan and consultation with Commission

B. Launch of Thematic Multiplex Channels

- ENCORE 2 - Love Stories (7/7/94)
- ENCORE 3 - Westerns (7/7/94)
- ENCORE 4 - Mystery (7/7/94)
- ENCORE 5 - Action/Adventure (9/1/94)
- ENCORE 6 - True Stories (9/1/94)
- ENCORE 7 - WAM!/America's Youth Network (9/20/94)

II. EMC's Request for Declaratory Ruling -- Two Separate Ruling Requests

A. Multiplex Exemption: ENCORE and its Thematic Multiplex Channels qualify for the Multiplex Exemption from the definition of "cable programming service" under 47 C.F.R. §76.901(b)(3) when offered:

1. As a stand-alone "tier" which includes ENCORE ("Multiplex Tier");
2. In two versions -- Multiplex Tier and a separate a-la-carte offering of ENCORE; and
3. With such Multiplex Tier in a package with one or more unregulated a-la-carte services as long as the Multiplex Tier, like all other a-la-carte services in the package, is separately available.

B. Negative Option: "[T]he multiplexing of ENCORE to existing ENCORE subscribers (i.e. those that have already affirmatively requested ENCORE), such that the only version of ENCORE available on the system is the Multiplex Tier, should not trigger the affirmative request requirement of 47 C.F.R. §76.981."

- Affirmative request requirement would apply to all new subscriptions and where cable operator continues to offer single-channel ENCORE as a separate a-la-carte service.

III. No Opposition to EMC's Request Except for SNI

- A. SNI benefits from the uncertainty which it has created -- cable operators have deferred launching EMC's Thematic Multiplex pending FCC confirmation.
- B. SNI initially violated the Sunshine Act in seeking to block the clarification requested by EMC and created additional uncertainty.
- C. SNI benefits from continued delay as it tries to "catch up" with its own theme channels (see advertisement).

IV. Legal Framework for Multiplex Exemption

- A. Multiplex Exemption was identified in House Report at 79-80, 90. Congress established two criteria for the exemption: (1) premium service; and (2) "commonly identified video programming."
 - 1. When Congress established Multiplex Exemption, numerous premium and non-premium multiplex experiments, which involved primarily counter-programming, were widely reported.
 - 2. The HBO multiplex offered by Congress as an example of exempt multiplex was promoted as "increas[ing] subscribers' real-time viewing choices, reduc[ing] the perception of repeats, and provid[ing] greater access to [HBO's] extensive programming inventory."
 - 3. Congress expressly endorsed multiplex experimentation and noted "trend" toward multiplexing.
- B. The Commission implemented the Congressionally-mandated Multiplex Exemption.

V. EMC's Thematic Multiplex And the Criteria for the Multiplex Exemption

- A. Both Congress and the Commission intended that the Multiplex Exemption extends to "premium services."
 - Congress distinguished premium services -- "traditionally offered on a stand-alone, per-channel basis (...like HBO and Showtime)" from other non-premium per-channel services which require Commission scrutiny to prevent evasion of rate regulation.

B. In order to qualify for the Multiplex Exemption, programming must be "commonly identified video programming," not identical. Based on the HBO model, EMC identified three characteristics of such programming:

- *First*, each of the multiplex channels has a name which is commonly identified with the primary channel.
- *Second*, the multiplex channels, whether scheduled in a counter-programming, time-shifting or other format, carry programming of the same themes or genres as the primary channel.
- *Third*, the same program inventory pool supplies the premium channel that is being multiplexed and the resulting multiplex channels.

VI. Need for Expeditious Action

- Harm to EMC from uncertainty and continuing delay caused by SNI.